85-1626

No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., LYMAS L. WINFIELD, and UNITED POLITICAL ACTION COMMITTEE OF CHESTER COUNTY, DAVID DANTZLER, JR., JOHN R. HICKS, III, DOCK L. MEEKS, individually and on behalf of all others similiarly situated,

Petitioners,

v.

LUKENS STEEL COMPANY, INTERNATIONAL STEELWORKERS OF AMERICA (AFL-CIO), LOCAL 1165, UNITED STEELWORKERS OF AMERICA (AFL-CIO) and LOCAL 2295, UNITED STEELWORKERS OF AMERICA (AFL-CIO),

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. What is the single federal characterization, for statute of limitations purposes, to be given to all claims alleging violation of the Civil Rights Act of 1866, 42 U.S.C. §1981?

2. Assuming (for purposes only of phrasing the question) that the principles announced in *Wilson v. Garcia*, 105 S. Ct. 1938 (1985), would mandate the selection of a state statute of limitations shorter than the statute of limitations which was applicable at the time the suit was filed, should *Wilson v. Garcia* be given retroactive application where (a) the Court of Appeals failed to apply the analysis required by *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); and (b) such retroactive application will deprive hundreds of members of the plaintiff class of a remedy for intentional race discrimination which has already been proven at trial; and (c) at the time when the plaintiffs suffered discrimination, and when they filed suit 13 years ago, no case "foreshadowed" the possible application of a statute of limitations shorter than the six-year statute which the Court of Appeals had uniformly applied to Pennsylvania employment discrimination claims before *Wilson v. Garcia*?

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Petitioners Charles Goodman, Ramon L. Middleton, Romulus C. Jones, Jr., Lymas L. Winfield, David Dantzler, Jr., John R. Hicks, III, Dock L. Meeks and United Political Action Committee of Chester County ("plaintiffs") respectfuly petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit dated

November 13, 1985, insofar as the decision of the Court of Appeals reversed the decision of the District Court that the six-year Pennsylvania statute of limitations at 12 P.S. §31 was applicable to plaintiffs' claims under 42 U.S.C. §1981.

OPINIONS BELOW

The unreported Memorandum of the District Court dated June 16, 1975, applying the Pennsylvania six-year statute of limitations at 12 P.S. §31 to plaintiffs' claims under 42 U.S.C. §1981 is reproduced in the Appendix at A-59 to A-63.[1]

The Opinion of the District Court dated February 13, 1984, on the liability issues in this case, is reported at 580 F.Supp. 1114 (E.D. Pa. 1984). That Opinion is reproduced in the Appendix at A-64 to A-162.

The unreported Memorandum and Orders of the District Court dated August 2, 1984, awarding injunctive relief against the defendants, are reproduced in the Appendix at A-163 to A-174.

The majority and dissenting Opinions of the Court of Appeals for the Third Circuit dated November 13, 1985, as amended on November 22, 1985, are reported at 777 F.2d 113 (3d Cir. 1985). These Opinions are reproduced in the Appendix at A-1 to A-34.

The unreported Order of the Court of Appeals for the Third Circuit denying plaintiffs' Petition for Rehearing, and separate Statement of Judge Garth Sur Petition for Rehearing, both dated January 7, 1986, are reproduced in the Appendix at A-35 to A-38.

JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit was entered on November 25, 1985. (*App.* at A-175 to A-176). Petitioners' timely Petition for Rehearing and/or Rehearing *en banc* was denied on January 7, 1986 (*App.* at A-35 to A-38), and this Petition for Certiorari is filed within 90 days of

1. References in this Petition to "*App.*" or "Appendix" are to the Appendix filed with this Petition under Supreme Court Rule 21.1(k).

that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1981:
42 U.S.C. §1982:
42 U.S.C. §1983:
42 U.S.C. §1988:
12 Pa. Stat. §31 (repealed):
12 Pa. Stat. §34 (repealed):

(Verbatim quotations of Statutes are set forth in the Appendix at A-177 to A-179.)

STATEMENT OF THE CASE

This employment discrimination class action was filed in the United States District Court for the Eastern District of Pennsylvania on June 14, 1973. The named individual plaintiffs are seven black employees of defendant Lukens Steel Company ("Lukens"), a Pennsylvania corporation engaged in manufacturing and selling steel products. The plaintiff United Political Action Committee of Chester County is a community organization formed to combat racial discrimination in the county in which Lukens is based. Some of its members are employees of Lukens. The international and local Union defendants (the "Unions") are the certified collective bargaining agents for all of Lukens' hourly employees.

In their Complaint, plaintiffs alleged that they and the class they sought to represent had been the victims of pervasive racial discrimination by Lukens and the Unions in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. §1981 ("Section 1981"). In an unpublished Opinion dated June 16, 1975, the District Court certified the case as a class action. (*App.* at A-59 to A-63.) In that Opinion, the District Court also held that the applicable statute of limitations for plaintiffs' claims under Section 1981 was the six-year Pennsylvania limitations provision set forth in 12 P.S. §31, which covered a broad range of tort and contract claims, including claims of injury to economic rights. (*App.* at A-60.) Thereafter, through 1980, the parties in this case engaged

in extensive pretrial discovery and motions, including more than 100 depositions of class members and others.

During 1980, the District Court held a 32-day trial on the merits. On February 13, 1984, more than 10 and one-half years after this case was filed, the District Court entered an Opinion finding that Lukens and the Unions had violated Title VII and Section 1981 by intentionally discriminating against the plaintiff class, and entered judgment on the class-wide liability issues largely in favor of plaintiffs. 580 F.Supp. 1114 (E.D. Pa. 1984). (*App*. at A-64 to A-162.) The District Court found that Lukens had intentionally discriminated against the plaintiff class in initial job assignments; promotions to craft positions; promotions to salaried positions; denial of incentive pay in one seniority grouping; discharge of employees during their probationary period; and toleration of racial harassment. 580 F.Supp. at 1163-64. (*App*. at A-160 to A-161.) The District Court also found that the Unions had discriminated against the plaintiff class by intentionally failing to challenge discriminatory discharges of probationary employees; intentionally failing to assert race discrimination as a ground for grievances; and intentionally tolerating racial harassment. 580 F.Supp. at 1164. (*App*. at A-161.) On August 2, 1984, the District Court entered injunctions in favor of the plaintiff class from which Lukens and the Unions appealed. (*App*. at A-163 to A-174.)

The Court of Appeals affirmed in part, reversed in part and vacated and remanded in part, 777 F.2d 113 (3d Cir. 1985). (*App*. at A-1 to A-54.) With respect to the statute of limitations determination, the Third Circuit held that this Court's Opinion in *Wilson v. Garcia*, 105 S.Ct. 1938 (1985) — which dealt only with claims under 42 U.S.C. §1983 ("Section 1983") — required that all claims under Section 1981 be characterized as personal injury claims. 777 F.2d at 117-20. (*App*. at A-7 to A-13.) The Court of Appeals then held that the applicable Pennsylvania statute of limitations was the two-year provision at 12 P.S. §34, which was limited to claims for damages arising out of bodily personal injuries. *Id*.

Despite noting that its selection of the two-year limitations statute was "seemingly anomalous" and "not fully consistent"

with Pennsylvania law, the Court of Appeals stated, without discussion, that its decision would be applied retroactively to shorten the statute of limitations for plaintiffs' Section 1981 claims in this case from six years to two years. 777 F.2d at 120 & n.3. (*App*. at A-13.) The Court of Appeals did not apply to the facts of this case the three-part retroactivity analysis required by *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Solely because of its statute of limitations determination, the Court of Appeals vacated the District Court's findings of discrimination in promotions to salaried positions and toleration of racial harassment and remanded those findings to the District Court for reconsideration as to whether there was sufficient evidence of class-wide violations within the new limitations period. 777 F.2d at 121. (*App*. at A-14 to A-16.)[2]

Judge Garth dissented from the panel Opinion with respect to the statute of limitations determination. 777 F.2d at 131-38. (*App*. at A-36 to A-52.) Judge Garth concluded that *Wilson v. Garcia* did not require that claims under Section 1981 receive the identical characterization, for statute of limitations purposes, as claims under Section 1983. 777 F.2d at 132. (*App*. at A-37 to A-39.) After demonstrating that the purpose, history and application of Section 1981 were substantially different from the purpose, history and application of Section 1983, Judge Garth concluded that, because the primary focus of Section 1981 was to secure economic rights, it would be inappropriate to characterize claims under that statute as personal injury claims. 777 F.2d at 132-38. (*App*. at A-39 to A-52.) Instead Judge Garth reasoned

2. In its other holdings, the Court of Appeals:

(a) ruled that no named plaintiff could represent the class on the initial job assignment discrimination claim and vacated the finding of class-wide discrimination in initial job assignments for the District Court to consider possible intervention by a new class representative;

(b) shortened by approximately two months the limitations period which the District Court had applied to the claims of discrimination against the Unions under Title VII;

(c) reversed the finding of discrimination in denial of incentive pay; and

(d) in all other respects affirmed the District Court's decision.

777 F.2d at 130-31. (*App*. at A-35 to A-36.)

that claims under Section 1981 should be characterized, for statute of limitations purposes, as claims for injury to economic rights, and that the most applicable Pennsylvania statute of limitations was the six-year provision at 12 P.S. §31 which had been applied by the District Court. *Id.*

Plaintiffs filed a timely Petition for Rehearing and/or Rehearing *en banc* with respect to the Court of Appeals' statute of limitations determination. The Court of Appeals denied this petition on January 7, 1986, with Judges Garth, Gibbons and Becker voting to grant rehearing *en banc*. (*App.* at A-55 to A-58.)

REASONS FOR GRANTING THE WRIT

I. Introduction

This Petition seeks review of two determinations by the Court of Appeals.

First, plaintiffs seek review of the Court of Appeals' decision concerning the characterization, for statute of limitations purposes, to be given claims under Section 1981. In *Wilson v. Garcia*, 105 St. Ct. 1938 (1985), this Court expressly determined only the characterization to be given claims under Section 1983, in light of the purpose, history and application of that particular statutory provision. Section 1981 is a different statutory provision with a history, purpose and application very different from Section 1983. Unlike the broad scope of the rights which Section 1983 sought to protect, Section 1981 was targeted primarily to prevent interference with economic rights of black persons. Accordingly, the Court of Appeals erred when it concluded that *Wilson v. Garcia* required Section 1981 claims to be characterized as personal injury claims rather than as claims for interference with existing and prospective economic rights.

Claims under Section 1981 or its companion, 42 U.S.C. §1982 ("Section 1982"), are included in virtually every suit alleging racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*, and the Fair Housing Act of 1968, 42 U.S.C. §§3601 *et seq.* Thus, in the absence of a definitive ruling by this Court, the issue of the appropriate federal characterization of Section 1981 and 1982 claims, for statute of limitations purposes, is likely to arise in many suits alleging racial discrimination in employment, housing and other economic relationships. Until this Court establishes a uniform characterization to be given claims under Section 1981, uncertainty and needless litigation concerning the applicable statute of limitations in Section 1981 cases will continue.

The second issue on which review is sought is the Court of Appeals' determination to shorten retroactively the statute of limitations applicable to plaintiffs' claims under Section 1981. The Court of Appeals conceded that its application of the shorter Pennsylvania limitations period — which covers only claims for *damages* for *bodily* personal injuries, *see Meyers v. Pennypack Woods Home Ownership Assoc.*, 559 F.2d 894, 902 (3d Cir. 1977) — was "seemingly anomalous" and "not fully consistent" with state law. 777 F.2d at 120 n.3. (*App.* at A-13.) Moreover, before *Wilson v. Garcia*, the Court of Appeals had held the longer Pennsylvania limitations provision applicable in cases similar to this one, relying on what the Court of Appeals called clear and uniform case law. *Meyers*, 559 F.2d at 902-03.

Under such circumstances, the Court of Appeals' decision to apply *Wilson v. Garcia* retroactively and to shorten the statute of limitations, long after this case had been extensively litigated through trial and decision on the merits, is in dramatic conflict with the decision of this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Indeed, the Court of Appeals did not cite *Chevron* or consider the facts of the present case in light of any of the three factors enunciated in *Chevron*.

The decision of the Third Circuit to apply *Wilson v. Garcia* retroactively in the present case is also in conflict with *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986), which held that retroactive application of the principles newly announced in *Wilson v. Garcia* would not be appropriate where the effect would be to apply a shorter statute of limitations than the limitations provision applied by the Court of Appeals before *Wilson v. Garcia*. *See also Jackson v. City of Bloomfield*, 731 F.2d 652 (10th Cir. 1984) (declining to retroactively shorten the statute of limitations applicable to Section 1983 claims and cited with approval by this Court in *Wilson v. Garcia*, 105 S. Ct. at 1941-42

n.10.) Because the decision by this Court in *Wilson v. Garcia* represented a fundamental change in the method of choosing the appropriate statute of limitations, and because there is a conflict in the federal judicial circuits on the retroactivity issue, *Fowler v. City of Louisville*, 625 F. Supp. 181, 183 (W.D. Ky. 1985), *Moore v. Floro*, 614 F. Supp. 328, 331 n.3 (N.D. Ill. 1985), it is important that the lower courts have guidance on the retroactive effect to be accorded changes in limitations periods as a result of *Wilson v. Garcia*.[3]

In sections II and III below, plaintiffs will set forth in detail the reasons why the Writ should be granted on these two important issues.

II. Claims Under Section 1981 Should Be Characterized, For Statute Of Limitations Purposes, As Actions For Injuries To Economic Rights.

A. *Wilson v. Garcia* Did Not Determine The Characterization, For Statute Of Limitations Purposes, To Be Given Claims Under Section 1981.

In *Wilson v. Garcia*, this Court determined "[t]he most appropriate state statute of limitations to apply to claims enforceable under §1 of the Civil Rights Act of 1871, which is codified in its present form as 42 U.S.C. §1983." 105 S. Ct. at 1940. In reaching this determination, the Court rendered the following three distinct holdings:

3. The conflict in the Circuits over the retrospective application of *Wilson v. Garcia* parallels a similar conflict respecting the retroactive application of the principle anounced in *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). *Compare International Assoc. of Machinists & Aerospace Workers v. Aloha Airlines*, 781 F.2d 1400 (9th Cir. 1986), and *Zemonick v. Consolidation Coal Co.*, 762 F.2d 381, *reh. granted en banc*, 775 F.2d 1157 (4th Cir. 1985) (both denying retroactive application of *Del Costello*) *with Smith v. General Motors Corp.*, 747 F.2d 372, 374-76 (6th Cir. 1984) (applying *Del Costello* retroactively). *See also Gibson v. United States*, 781 F.2d at 1339 n.1.

(1) Under 42 U.S.C. §1988 ("Section 1988") federal law governs the characterization, for statute of limitations purposes, of Section 1983 claims, 105 S. Ct. at 1943-44;

(2) All Section 1983 claims should be given the same characterization, without regard to the specific facts of each case, *id.* at 1944-47; and

(3) In light of the history, purpose and application of Section 1983, all claims under *that* statute should be characterized as personal injury actions, *id.* at 1947-49.

There is no doubt that the first two holdings of *Wilson v. Garcia* should apply to Section 1981 as well as Section 1983. That is to say, federal law should govern the characterization of Section 1981 claims for statute of limitations purposes and all Section 1981 claims should be given the same characterization regardless of the specific facts of each case. There is no reason to distinguish between Section 1983 and Section 1981 with respect to these holdings.

The decision in *Wilson v. Garcia*, however, did not state or imply that the "personal injury" limitations characterization for actions brought under Section 1983 was also applicable to actions brought under Section 1981. *Pender v. National Railroad Passenger Corp.*, 625 F. Supp. 252, 254-55 (D.D.C. 1985); *cf. Burnett v. Grattan*, 104 S. Ct. 2924, 2929 n.11 (1984). To the contrary, the Court reached its third holding in *Wilson v. Garcia* by examining the history, purpose and application of Section 1983 *alone*, and did not examine or discuss Section 1981. Thus, *Wilson v. Garcia* requires that the appropriate uniform characterization for claims under Section 1981 be determined by examining the purpose, history and application of that provision.[4]

4. The few decisions in the wake of *Wilson v. Garcia* which have characterized Section 1981 claims as "personal injury" claims have not examined or referred to the history, purpose or application of Section 1981. *See Anderson v. University Health Center*, 623 F. Supp. 795, 796 (W.D. Pa. 1985); *Saldivar v. Cadena*, 622 F. Supp. 949, 956-58 (W.D. Wisc. 1985). *See also Watson v. Carpenter Technology*, No. 82-1800 (E.D. Pa. December 2, 1985); *Berry v. E.I. DuPont De Nemours & Co.*, 625 F. Supp. 1364, 1375-76 (D. Del. 1985) (both bound by the Third Circuit's decision in the present case). In *EEOC v.*

B. The Purpose Of Section 1981 Differs From The Purpose Of Section 1983.

In gauging the purpose of a statute, it is axiomatic that a court must first look to the language of the statute. When this Court, in *Wilson v. Garcia*, examined the language of Section 1983, it found it "useful to recall that . . . [t]he high purposes of . . . [Section 1983] make it appropriate to accord the statute 'a sweep as broad as its language.' " 105 S. Ct. at 1945 (citation omitted). Section 1983 itself does not grant any substantive rights but simply a remedy for infringement of rights granted elsewhere. Accordingly, its language is exceedingly broad — it covers "the deprivation of *any* rights, privileges, or immunities secured by the Constitution or laws." 42 U.S.C. §1983 (emphasis added).

Section 1981, by contrast, confers upon persons in the United States a specific set of rights. Accordingly, while the broad language of Section 1983 was *not* easily susceptible to a single characterization, the language of Section 1981 *is*. On this very point, this Court has already spoken clearly:

> [Section 1981] on its face relates primarily to racial discrimination in the making and enforcement of contracts.

Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459 (1975). *See also Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017 n.16 (5th Cir. 1971) ("It is, after all, the right to 'make and enforce contracts' which is protected by § 1981.")

Equally significant, the language of 42 U.S.C. § 1982 ("Section 1982"), a "companion" to Section 1981 in the Civil Rights

NOTES *(Continued)*

Gaddis, 733 F.2d 1373 (10th Cir. 1984), the Tenth Circuit , without discussing or considering the history, purpose or application of Section 1981, held that Sections 1981 and 1983 should be characterized identically. *EEOC v. Gaddis* was decided before this Court's decision in *Wilson v. Garcia*, and the Tenth Circuit therefore did not have the benefit of this Court's discussion of the importance of history, purpose and application in characterizing a federal statute, for limitations purposes.

Act of 1866, *General Building Contractors Assoc. v. Pennsylvania*, 458 U.S. 373, 383 (1982), is unequivocally directed at the economic rights to "inherit, purchase, lease, sell, hold and convey real and personal property." A claim for violation of these rights bears no resemblance to a "personal injury" claim.[5]

In order to characterize claims under Section 1981 (and Section 1982) as personal injury claims, the language of those provisions must be radically distorted from its plain meaning. Fairly read, that language compels the characterization of Sections 1981 and 1982 as provisions aimed at the protection of economic rights.

C. The History Of Section 1981 Differs From The History Of Section 1983.

In concluding that Section 1983 should be characterized, for statute of limitations purposes, as a personal injury statute, this Court, in *Wilson v. Garcia*, looked largely to the history of Section 1983, which was originally enacted as Section 1 of the Civil Rights Act of 1871, 17 Stat. 13. Stressing the *physical* threats to which blacks were exposed at the end of the Civil War, this Court recapitulated that history as follows:

> The specific historical catalyst for the Civil Rights Act of 1871 was the campaign of violence and deception in the south, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights. *See Brisco v. LaHue*, 460 U.S. 325, 336-340 (1983). The debates on the Act chronicle the alarming insecurity of life, liberty and property in the Southern States, and the refuge that local authorites extended to the authors of these outrageous incidents:

5. This Court has held that Sections 1981 and 1982 have common origins and should be construed *in pari materia*, *e.g.*, *Runyon v. McCrary*, 427 U.S. 160, 170 (1976); *Tillman v. Wheaton-Haven Recreation Assoc.*, 410 U.S. 431, 439-40 (1973), but that Section 1983 has a different origin and may be differently construed, *District of Columbia v. Carter*, 409 U.S. 418 (1973).

> "While murder is stalking abroad in disguise, while whippings and lynchings and banishing have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of public tribunals are searched in vain for any evidence of effective redress." Cong. Globe, 42d Cong. 1st Sess., 374 (1871) (remarks of Rep. Lowe).

105 S.Ct. at 1947 (footnote omitted). Similarly, in *Jones v. Preuit & Mauldin*, 763 F.2d 1250 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 893 (1986), in the course of selecting the Alabama limitations statute applicable to Section 1983 claims in light of *Wilson v. Garcia*, the Eleventh Circuit stated:

> The paradigmatic personal injuries covered by [Section 1983], those that motivated the Congress to take action, were acts of intentional and direct violence on the part of the Ku Klux Klan. . . . The debates focused on arson, robbery, whippings, shootings, murders, and other forms of violence and intimidation, perpetrated by the Klan.

763 F.2d at 1255 (citation omitted). *See also Hobson v. Brennan*, 625 F. Supp. 459, 468 (D.D.C. 1985).

In stark contrast, the history of Section 1981 reinforces the conclusion that its focus is principally economic in nature. The provision's language originated in Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, which was passed pursuant to the Thirteenth Amendment. *General Building Contractors Assoc. v. Pennsylvania*, 458 U.S. 375, 384 (1982).[6] The "principal object"

6. The relevant portion of Section 1 of the 1866 Civil Rights Act was substantially reenacted as Section 16 of the Civil Rights of 1870, which was enacted to enforce the Fourteenth Amendment. *Young v. International Telephone & Telegraph Co.*, 438 F.2d 757, 759-60 (2d Cir. 1971). Section 1983, on the other hand, was originally enacted as part of the Civil Rights Act of 1871, and is based *solely* on the Fourteenth Amendment. *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972).

of the 1866 Act was the eradication of the Black Codes. *Id.* at 386. These infamous laws, enacted by Southern legislatures, focused in large measure on restrictions of economic rights, particularly employment relationships. *See Croker v. Boeing*, 662 F.2d 975, 1004 n.5 (3d Cir. 1981) (Gibbons, J., dissenting in part).

Senator Trumbull, the legislator who introduced the 1866 Act, specified as follows those rights to which that Act was directed, describing them as the "great fundamental rights":

> The right to acquire property, the right to come and go at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property.

Cong. Globe, 39th Cong., 1st Sess. 475 (1866), *quoted* in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 432 (1968). Plainly these rights reflect an individual's economic interests, not the protection of his physical person from injury. *See Al-Khazraji v. St. Francis College*, 40 F.E.P. Cases 397, 407 (3d Cir. 1986) (Adams, J., concurring) (". . . § 1981 was intended to place blacks on an equal footing with whites by prohibiting racial discrimination in private contracts.") citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 427-28).

Indeed, Senator Trumbull subsequently reiterated the economic focus of the Act:

> Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights, *the right to the fruit of their own labor, the right to make contracts, the right to buy and sell* and enjoy liberty and happiness. . . .

Cong. Globe, 39th Cong., 1st Sess. 599 (1866), *quoted in McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 290 (1976) (emphasis added). As this Court stated in *Jones v. Alfred H. Mayer Co.*, in discussing the history of Section 1982:

> Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom — freedom to "go and come at pleasure" and to "buy and sell when they please" — would be left with "a mere paper guarantee" if Congress were powerless to assure that *a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man*. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to *buy* whatever a white man can *buy*, the right to live wherever a white man can live.

392 U.S. at 443 (footnotes omitted) (emphasis added).[7]

Thus, the history of Sections 1981 and 1982, in addition to their language, inescapably counsels that those Sections, unlike Section 1983, were principally directed to the protection of economic rights.[8]

7. A more complete discussion of the differing legislative histories of Sections 1981 and 1983 is set forth in Judge Garth's dissenting Opinion in the present case. 777 F.2d at 131-38 (*App.* at A-39 to A-45 .)

8. This Court previously has referred to and relied upon the different legislative histories and purposes of Sections 1981 and 1982, on the one hand, and Section 1983, on the other hand, to show that the statutes should be interpreted differently. *See District of Columbia v. Carter*, 409 U.S. 418 (1973) (holding that the District of Columbia was not a "State or Territory" under Section 1983, although it was under Section 1982). *See also Monroe v. Pape*, 365 U.S. 167, 205-06 (1961) (Frankfurter, J., concurring in part and dissenting in part) ("Different problems of statutory meaning are presented by two enactments deriving from different constitutional sources.") In this connection, it is important to note that Section 1981 is limited to discrimination on the basis of race, but extends to private conduct as well as government conduct. *Runyon v. McCrary*, 427 U.S. 160, 170 (1976). *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975); *Tillman v. Wheaton-Haven Recreation Assoc.*, 410 U.S. 431, 439-40 (1973). Claims under Section 1983 are not limited to claims based on race, but reach only wrongs committed under color of state law, not private conduct. *Pender v. National Railroad Passenger Corp.*, 625 F. Supp. 252, 255 (D.D.C. 1985).

D. The Use And Application Of Section 1981 In The Overwhelming Majority Of Cases Has Been To Redress Injuries To Economic Rights.

Putting Section 1981 claims into the category of personal injury actions, for statute of limitations purposes, would do more than violate the language and history of Section 1981. It would also ignore the actual basis for the vast majority of cases which have been brought under Section 1981. An analysis of the annotations to Section 1981 in the United States Code Annotated shows that almost 80% of all such annotations (aside from those referring to cases in which courts held that no claim was stated under Section 1981) refer to employment discrimination cases.[9] An additional 13% of such annotations refer to cases alleging discrimination in other contracts or in access to public or private facilities or housing. Thus, more than 90% of the annotations refer to cases which arose out of some existing or prospective economic relationship.

Indeed, as recently as 1977, the Third Circuit could find only three cases construing the "equal benefit" and "like punishment" clauses of Section 1981, although there was "an abundance of case law under Section 1981 dealing with claims of deprivation of the guaranteed right 'to make and enforce contracts'." *Mahone v. Waddle*, 564 F.2d 1018, 1027 & n.13 (3d Cir.

9. The analysis performed by plaintiffs' counsel consisted of classifying each annotation according to the subject matter of the claim asserted, as disclosed by the annotation itself and, where necessary, by reading the opinion referred to, and then adding the number of annotations in each subject matter classification. A total of 1,653 annotations were reviewed. Of these, 227 referred to cases in which the Court held the plaintiff failed to state a claim under Section 1981. Of the remaining 1,426 annotations, 1,123 referred to cases based on allegations of employment discrimination, and 186 referred to cases based on allegations of discrimination in other contracts or access to public or private facilities or housing. All annotations contained in the 1981 main volume and the 1985 pocket part were reviewed, except for 7 state court cases and 21 older cases appearing in "Federal Cases" or volumes of the United States Reports before volume 101. While no attempt was made to eliminate duplications caused by the appearance of more than one annotation to any case, it is hardly likely that doing so would substantially change the compelling nature of these figures.

1977), *cert. denied*, 438 U.S. 904 (1978). In vivid contrast to this Court's finding in *Wilson v. Garcia* that litigants have used Section 1981 to assert claims which "encompass numerous and diverse topics and subtopics," 105 S. Ct. at 1946, experience shows that the great preponderance of Section 1981 claims have hovered around only one topic — interference with economic rights.

E. Claims Under Section 1981 Should Be Characterized, For Statute Of Limitations Purposes, As Actions For Injuries To Economic Rights.

As set forth above, the language, history and application of Section 1981 differ from that of Section 1983. When the reasoning of the Court in *Wilson v. Garcia* is applied to Section 1981, it is readily apparent that the single most appropriate characterization to be given claims under Section 1981 is that of actions for injuries to economic rights.

There are additional reasons why claims under Section 1981 should not be characterized as personal injury claims. First, according to *Wilson v. Garcia*, Section 1988 provides the starting point for determination of an appropriate statute of limitations for claims under Section 1981. 105 S. Ct. at 1942. There is nothing in Section 1988 which even remotely suggests that the same statute of limitations characterization should be given claims under Sections 1981 and 1983. To the contrary, the command of Section 1988 to look to state limitations law suggests that deference be given to the policy decisions of the various states underlying their respective statutes of limitations, as long as these state policies are not inconsistent with federal policies. *See Robertson v. Wegmann*, 436 U.S. 584, 588-94 (1978); *Burnett v. Grattan*, 104 S. Ct. 2924, 2935 (1984) (Rehnquist, J., concurring in judgment).

In this connection, most states allow longer limitations periods for claims of injuries to economic rights than for personal injury claims:

> Most states have concluded that economically grounded causes of action will more frequently arise from patterned and well-documented courses of conduct than will claims for personal injury. . . . There is no reason we should not respect these policy choices, grounded as they are in real and substantial differences between and among causes of action, in applying civil rights statutes which reflect the same differences.

Statement of Judge Garth sur Petition for Rehearing at p. 3 (*App.* at A-57.) Although the breadth of Section 1983 renders state limitations decisions only "a rough approximation" of the interests relevant to federal policy, *Wilson v. Garcia*, 105 S. Ct. at 1945, the more homogeneous nature of Section 1981 claims allows a characterization harmonious with State law policies. In short, characterization of claims under Section 1981 as economic injury claims best reflects the important interest of federalism.

Second, claims for interference with existing or prospective economic relationships are familiar and frequently used causes of action. *See generally* Restatement (Second) of Torts at Division Nine, §§762 *et seq.* (1979) ("This division deals with the liability of one who intentionally interferes with advantageous economic relations."). Not only will the respective state limitations provisions for such causes of action be relatively easy to determine, but also it is highly unlikely that the period of limitations applicable to such claims was or could be fixed in a way which might be inconsistent with federal policy. *See Wilson v. Garcia*, 105 S. Ct. at 1949.

Finally, the federal policy interest in reducing federal litigation would be better served by recognizing the longer economic injury statutes of limitations as applicable to Section 1981 claims. As set forth above, the vast majority of Section 1981 and Section 1982 claims relate to economic discrimination in employment or housing. Most of these claims also constitute alleged violations of other federal anti-discrimination statutes which require administrative proceedings before litigation in the federal courts. *See, e.g.*, Fair Housing Act of 1968, 42 U.S.C. §§3601 *et seq.*; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* Imposing the shorter personal injury statutes of limitations on such discrimination claims will force plaintiffs to sue in federal court under Sections 1981 and 1982 before awaiting the

outcome of administrative proceedings. Inexorably, the important federal policy of encouraging administrative conciliation of such claims will be affected adversely. *Cf. Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 468-76 (1975) (Marshall, J., concurring in part and dissenting in part).

For these reasons, the Court of Appeals erred in its decision to characterize Section 1981 claims as personal injury claims. Because this Court has not spoken on this issue, and because this issue is likely to arise in many Section 1981 cases, it is important that the lower courts, as well as parties, potential parties and their counsel, have a decision by this Court on this important federal issue.

III. The Decision By The Court Of Appeals To Retroactively Shorten The Statute Of Limitations In This Case Is In Conflict With The Principles Established By This Court In *Chevron Oil Co. v. Huson* And Is In Conflict With Decisions Of Other Federal Courts, Including Two Courts Of Appeals.

A. The Chevron Principles.

This Court has long recognized that retroactive application of a newly established principle of law can work unwarranted and harsh inequities on litigants. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Coupled with this recognition has been a willingness to reject the wholesale implementation of a natural law theory and a corresponding readiness to acknowledge that courts do in fact establish new law which might, in defined circumstances, be unfair to apply in anything other than a prospective fashion.

> "We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights." *Griffin v. Illinois*, 351 U.S. 12 . . ., (Frankfurter, J., concurring in judgment).

Chevron, 404 U.S. at 107. *See also Service Employees International Union v. Office Center Services, Inc.*, 670 F.2d 404, 412 n.19 (3d Cir. 1982).

In *Chevron*, this Court established three criteria by which courts should determine whether to apply statute of limitations decisions retroactively:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . . Finally, we have weighed the inequity imposed by retroactive application, for "[W]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07 (citations omitted).

B. The Court Of Appeals Failed To Perform The Analysis Required By Chevron.

After deciding that *Wilson v. Garcia* required that section 1981 claims be characterized as personal injury claims, the Court of Appeals held that its decision would be retroactively applied to shorten the limitations period in this case from six years to two years.[10] The Court of Appeals' entire discussion of retroactivity

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10. The Court of Appeals clearly believed its personal injury characterization holding was *required* by *Wilson v. Garcia*, for it relied on that belief to justify departing from its previous decisions in *Meyers v. Pennypack Woods Home Ownership Assoc.*, 559 F.2d 894 (3d Cir. 1977), and *Davis v. United States Steel Supply*, 581 F.2d 335 (3d Cir. 1978), despite its own internal rule forbidding one panel from overruling another panel's decision. 777 F.2d at 120. (*App.* at A-13.) Indeed, its later opinion in *Al-Khazraji v. St. Francis College*,

in the present case consisted of but a single sentence:

> For the reasons set forth in *Smith v. City of Pittsburgh* [764 F.2d 188 (3d Cir.), *cert. denied*, 106 S.Ct. 349 (1985)], we also conclude that our decision should be given the customary retroactive effect. *See Fitzgerald v. Larson*, 769 F.2d 1260 (3d Cir 1985).

711 F.2d at 120. (App at A-13.)

Smith and *Fitzgerald*, however, do not explain the retroactivity decision in the present case. The Pennsylvania limitations provisions which apply to the present case were repealed in 1978, before the claim in *Smith* and *Fitzgerald* arose. It was the *revised* statutes of limitation which were applied in *Smith* and Fitzgerald. Indeed, in *Smith*, the Court of Appeals *distinguished* cases, like the present one, to which the revised statutes of limitations did *not* apply. *Smith*, 764 F.2d at 195 n. 3. Because *Smith* and *Fitzgerald* involved limitations provisions completely different from the present case, the Court of Appeals' citation of those cases does not provide any basis for the Court of Appeals' decision to retroactively reduce the limitations period in this case.[11]

The bottom line is that the Court of Appeals failed to explain or even discuss in any meaningful way its decision to retroactively apply a shorter statute of limitations than the limitations period in effect before *Wilson v. Garcia*. The Court of Appeals' inexplicable failure to apply the three *Chevron* criteria to the facts of the present case plainly constitutes error. When properly

NOTES *(Continued)*

40 F.E.P. Cases 397, 403 (3d Cir. 1986) (written by one of the Judges in the majority in the present case), stated that *Wilson v. Garcia* "made the *Goodman* decision inevitable."

11. Not only did *Smith* and *Fitzgerald* involve different statutes of limitations from the present case, but also they were both individual cases in which, as the Court of Appeals noted, little discovery and no trial had occurred. *Smith*, 764 F.2d at 196; *Fitzgerald*, 769 F.2d at 161-62. The present case, by comparison, has proceeded for 13 years, including extensive discovery and a 32-day trial. Comparing the effect of retroactivity in *Smith* and *Fitzgerald* to the effect in the present case is like comparing the effect of a firecracker to that of a bomb.

considered, those criteria mandate nonretroactive treatment of *Wilson v. Garcia*.

C. Consideration Of The First *Chevron* Factor Supports Nonretroactive Application Of *Wilson v. Garcia* In The Present Case.

The first *Chevron* factor is whether the judicial decision establishes a new principle of law *either* by overruling clear past precedent *or* by deciding an issue of first impression in a manner which was not clearly foreshadowed. When measured against this standard, the Court of Appeals' decision imposes an impossible burden of foresight on litigants.

The issue decided in *Wilson v. Garcia* was one of first impression for this Court. The Court's decision to apply a uniform statute of limitations characterization to all Section 1983 claims was also a new principle of law and was completely "unforeshadowed." *Smith*, 764 F.2d at 194; *Fitzgerald*, 769 F.2d at 163; *Small v. Inhabitants of Belfast*, 617 F. Supp. 1567, 1574 (D. Me. 1985); *Moore v. Floro*, 614 F. Supp. at 332. To be sure, in the context of Section 1981's emphasis on the "making and enforcement of contracts," even if plaintiffs had been able to forecast the statute of limitations selection method newly established in *Wilson v. Garcia*, no amount of prescience (or legal reasoning) could have divined the application of the two-year Pennsylvania limitations provision, 12 P.S. §34, which covered only claims for *damages* for *bodily* personal injury, rather than the six-year provision, 12 P.S. §31, which covered claims for torts not resulting in bodily injury and claims for breach of contract. *See Meyers v. Pennypack Woods Home Ownership Assoc.*, 559 F.2d 894, 902 (3d Cir. 1977). Indeed, the fact that the present case did not include any allegation of bodily injury required the Court of Appeals to characterize its selection of the two-year limitations provision as "seemingly anomalous" and "not fully consistent" with state law. 777 F.2d at 120 n.3. (*App.* at A-13.)[12]

12. The fact that Pennsylvania's two-year limitations provision applied *only* to *damage* claims for *bodily* injury clearly distinguishes this case from

The Court of Appeals' retroactivity determination in the present case is even more difficult to understand in view of the Court of Appeals' own pronouncements, before *Wilson v. Garcia*, on the clarity of the applicable limitations law. In *Meyers*, decided in 1977, the Third Circuit held that claims of housing discrimination under Sections 1981 and 1982 were subject to the Pennsylvania six-year limitations provision.[13] After noting that Pennsylvania's two-year limitations provision was limited to claims for damages and applied only to *bodily* personal injuries, the Court in *Meyers* went on to state:

> We need not base our decision on such considerations, however, *since the case law is clear*. In state lawsuits resembling Meyers action, both Pennsylvania and federal courts applying Pennsylvania law have *uniformly* applied the six-year limitation.

559 F.2d at 902-03 (emphasis added) (citations omitted). In support of this statement, the Court of Appeals cited seven state and federal decisions, all of which were decided before plaintiffs in this case filed their Complaint and six of which were decided before plaintiffs' cause of action in this case arose in 1970.

In essence, the Court of Appeals' decision to retroactively apply the shorter limitations period in this case can only mean

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NOTES *(Continued)*

Runyon v. McCrary, 427 U.S. 160, 180-82 (1976), in which this Court affirmed the Fourth Circuit's application of Virginia's personal injury statute of limitations in a Section 1981 case. In *Runyon v. McCrary*, this Court pointed out that no court had ever held that Virginia's personal injury limitations provision applied only to *bodily* injury claims. 427 U.S. at 182. The Court also noted that, if the Virginia limitations provision had been limited to *bodily* injuries, plaintiffs' contention that it did not apply to their claims of nonbodily injury would "certainly [be] rational." 427 U.S. at 181. In *Meyers*, the Third Circuit squarely confirmed that Pennsylvania's two-year limitations provision did apply *only* to claims for *damages* for *bodily* injuries. 559 F.2d at 902.

13. In 1978, the Court of Appeals cited *Meyers* in applying the six-year limitations provision to claims of employment discrimination under Section 1981. *Davis v. United States Steel Supply*, 581 F.2d 335 (3d Cir. 1978). Before *Wilson v. Garcia*, the Third Circuit never applied any other limitations provision to an employment discrimination case.

that either the Court of Appeals misunderstood the federal principles upon which retroactivity is determined, or that it assumed that the plaintiffs in this case should have been able to foresee an anomalous limitations selection which was inconsistent with state law, rather than selection of a limitations statute whose application was based on "clear" and uniform decisions in factually similar cases. *Chevron*, however, cannot be read to require litigants to see through walls.

> [I]t would produce the most "substantial inequitable results" . . . to hold that [plaintiff] "slept on his rights" at a time when he could not have known the time limitation that the law imposed upon him.

Chevron, 404 U.S. at 108 (citation omitted).

In its recent decision in *Al-Khazraji v. St. Francis College*, 40 F.E.P. Cases 397 (3rd Cir. 1986), the Third Circuit attempted, in a footnote, to explain its decision in the present case. In *Al-Khazraji*, the Court of Appeals held that the Pennsylvania two-year personal injury statute of limitations would not be applied retroactively to the Section 1981 claims of the plaintiff in *Al-Khazraji*, where retroactive application would have reduced the limitations period in that case. 40 F.E.P. Cases at 401-404 The Court noted that its decision in the present case to characterize all section 1981 claims as personal injury claims and to apply a two-year limitations period to all such claims "established a new principle of law and overruled clear past precedent on which litigants reasonably could have relied." 40 F.E.P. Cases at 403. In a footnote, however, the Court distinguished the plaintiff in *Al-Khazraji* from the plaintiffs in the present case on the following basis:

> The cause of action that was the basis for the *Goodman* case arose in May 1970. The conclusion that *Goodman* is to be retroactively applied to the plaintiff in *Goodman* itself does not mandate that *Goodman* be retroactively applied to [the] plaintiff [in *Al-Khazraji*]. The crucial distinction between the situation in *Goodman* and that involved [in *Al-Khazraji*] is the relative clarity of this Circuit's law regarding the

> proper limitations period. In 1970, that law was not clear. However, as discussed below, this had changed by the time *Al-Khazraji's* claim arose [in 1978].

40 F.E.P. Cases at 402 n.9 (citation omitted).

The above statement, of course, ignores that part of the first *Chevron* factor which refers to issues of "first impression whose resolution was not clearly foreshadowed . . .," 404 U.S. at 106, and it does not address the second and third *Chevron* factors at all. Significantly, in a retroactivity decision handed down by the Third Circuit less than two months after its decision in the present case, the Third Circuit relied on the alternative prong of the first *Chevron* factor to deny retroactive effect to this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985). In *Mineo v. Port Authority of New York & New Jersey*, 779 F.2d 939 (3d Cir. 1985), the Court of Appeals stated:

> Inasmuch as the Port Authority encountered an *unresolved* issue of law, on which it took a reasonable position, retroactive application of *Garcia* . . . is not equitable.

779 F.2d at 946. *Cf. Solem v. Stumes*, 465 U.S. 368, 104 S. Ct. 1338, 1344-45 (1984). Had the Court of Appeals in the present case properly applied the first *Chevron* factor, as it did in *Mineo*, retroactive reduction of the statute of limitations in the present case would not have been supportable.[14]

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14. We note also that the Court of Appeals' attempt in *Al-Khazraji* to distinguish the present decision ignores the Third Circuit's own previous analysis of the clarity of the applicable limitations law. The Third Circuit's statement, in *Al-Khazraji*, on the clarity of the limitations law in 1970 — "that law was not clear," 40 F.E.P. Cases at 402 — constrasts starkly with that Court's pronouncement in *Meyers* that application of the six-year limitations provision was based on "clear" and uniform case law in six pre-1970 factually similar cases. *Meyers*, 559 F.2d at 902. Indeed, in *Al-Khazraji*, the Court of Appeals conceded that in *Meyers* it "had no trouble" in declaring the six-year limitations period applicable to the Section 1981 claims there involved. 40 F.E.P. Cases at 402.

D. Consideration Of The Second *Chevron* Factor Supports Nonretroactive Application Of *Wilson v. Garcia* In The Present Case.

The second *Chevron* factor is whether retroactive application of the newly announced principle will further or retard the purpose of the rule in question. On this issue, the Third Circuit has held that the policies of *Wilson v. Garcia* will not be retarded by nonretroactive application. *Smith v. City of Pittsburgh*, 764 F.2d at 196. Significantly, in the present case, nonretroactive application of *Wilson v. Garcia* will promote the important remedial aims of Section 1981. Retroactive effect, however, will deny a remedy to hundreds of victims of proven racial discrimination and will increase litigation by forcing reconsideration of the District Court's findings of discrimination in promotions to salaried positions and toleration of racial harassment. *See* 777 F.2d at 121. (*App.* at A-14 to A-16.)

E. Consideration Of The Third *Chevron* Factor Supports Nonretroactive Application Of *Wilson v. Garcia* In The Present Case.

The third *Chevron* factor is whether retroactive application of the new rule could produce substantial inequitable results. The Court of Appeals did not consider equity at all. When that factor is considered, a determination against retroactive shortening of the statute of limitations in this case is imperative.

In construing the "equity" factor in the *Chevron* case, this Court viewed as relevant the amount of effort already expended in the case. In denying retroactive application to the statute of limitations decision involved in *Chevron*, this Court noted:

> To abruptly terminate this lawsuit that has proceeded through lengthy and, no doubt, costly discovery stages for a year would surely be inimical to the beneficent purpose of the Congress.

404 U.S. at 108.

The length of the proceedings in the present case makes the proceedings in *Chevron* pale. The single year of discovery in

Chevron is dwarfed by 13 years of discovery, investigation, preparation, motions, trial and appeal in this case. During discovery, over 100 depositions were taken and hundreds of thousands of pages of documents were produced. The transcript of the 32-day trial is more than 5,800 pages long. 157 witnesses testified; more than 2,000 exhibits were admitted.[15]

What is more, the District Court *actually found* in favor of plaintiffs on most of the liability issues in this massive class action. (*App*. at A-160 to A-161; A-163.) To now apply retroactively a change in law which denies a remedy to hundreds of victims of *proven* racial discrimination, after the passage of 13 years since the filing of this suit, would reduce the natural law "fiction" to a real life weapon, wielded unfairly. In *Chevron*, this Court stated that "nonretroactive application . . . simply preserves [plaintiffs'] right to a day in court." 404 U.S. at 108. In this case, nonretroactive application preserves plaintiffs' right to relief after plaintiffs *prevailed* on the merits during their day in court.

F. There Is A Conflict In The Courts Of Appeals And District Courts Concerning The Retroactive Application Of The Principles Announced In *Wilson v. Garcia*.

In assessing the *Chevron* factors in the context of *Wilson v. Garcia*, the Ninth Circuit has stated that the *Chevron* factors

15. *Cf. Zemonick v. Consolidation Coal Co.*, 762 F.2d 381, 388, *reh. granted en banc*, 775 F.2d 1157 (4th Cir. 1985) (refusing to apply retroactively *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983)):

> The plaintiffs have expended considerable time and effort in the development of their case on the merits; they had a considerable investment in the prosecution of their claims. Under these circumstances it is difficult to imagine a greater inequity than to have the courthouse door suddenly slammed in the faces of the plaintiffs at a time when they apparently stood on the eve of decision on the merits. They had been long in the court when the district judge announced, in effect, that he was closing the book because the plaintiffs should never have crossed the threshold of the courthouse door more than two years earlier.
>
> Given the reasonable reliance of the plaintiffs upon what appeared to be established and solid precedent and the full development by the parties of their proofs on the merits, equity and fairness required that the court not abruptly turn a deaf ear to them.

may lead to different results where retroactive application of *Wilson v. Garcia* would shorten the applicable limitations period than where retroactive application would lengthen the limitations period. *Compare Rivera v. Green*, 775 F.2d 1381, 1383-84 (9th Cir. 1985) (retroactively lengthening statute of limitations), *with Gibson v. United States*, 781 F.2d 1334, 1338-40 (9th Cir. 1986) (refusing to retroactively shorten limitations period). The Ninth Circuit has referred to the strong interests of "access to the Courts" and "the disfavored nature of the statute of limitations defense." *Rivera v. Green*, 775 F.2d at 1384.[16] In this context, it is noteworthy that this Court's decision in *Wilson v. Garcia* itself had the effect of rendering the plaintiff's claim viable, and that the Court cited with approval the Tenth Circuit's decision in *Jackson v. City of Bloomfield*, 731 F.2d 652 (10th Cir. 1984), against retroactive application which would have barred the plaintiff's claim. 105 S. Ct. at 1941-42 n.20.

In the present case, the Third Circuit gave no consideration to these factors. The Court of Appeals' failure even to consider these factors is particularly puzzling in light of the numerous conflicting decisions reached by other federal courts with respect to the retroactivity of changes in applicable limitations periods. *Fowler v. City of Louisville*, 625 F. Supp. 181, 183 (W.D. Ky. 1985); *Moore v. Floro*, 614 F. Supp. 328, 331 n.3 (N.D. Ill. 1985). *Compare Al-Khazraji v. St. Francis College*, 40 F.E.P. Cases 397 (3d Cir. 1986) (prospective application only of reduced limitaions period); *Gibson v. United States*, 781 F.2d 1334, 1338-40 (9th Cir. 1986) (granting only prospective effect because retroactive application would reduce statute of limitations); *Jackson v. City of Bloomfield*, 731 F.2d 652, 654-55 (10th Cir. 1984), and *Abbitt v. Franklin*, 731 F.2d 661, 663-64 (10th Cir. 1984)

16. As the Ninth Circuit has stated:

> While prejudice to the defendant might occasionally result from the resurrection of a claim once thought dead, it is not likely to equal the prejudice to the plaintiff resulting from the unexpected death of a claim thought to be alive.

Barina v. Gulf Trading & Transportation Co., 726 F.2d 560, 564 n.8 (9th Cir. 1984).

(both granting prospective application only of Tenth Circuit decision in *Garcia v. Wilson*, 731 F.2d 640 (10th Cir. 1984), *aff'd* 105 S. Ct. 1938 (1985)); *Shorters v. City of Chicago*, 617 F. Supp. 661, 666-68 (N.D. Ill. 1985); *Small v. Inhabitants of Belfast*, 617 F. Supp. 1567, 1574-77 (D. Me. 1985); *Bynum v. City of Pittsburgh*, 622 F. Supp. 196, 198-99 (N.D. Cal. 1985); *Winston v. Sanders*, 610 F. Supp. 176 (C.D. Ill. 1985); *Saldivar v. Cadena*, 622 F. Supp. 949, 956 (W.D. Wisc. 1985); *Wegrzyn v. Illinois Dept. of Children & Family Services*, 39 F.E.P. Cases 1760, 1763 (C.D. Ill. 1986); *Hobson v. Brennan*, 625 F. Supp. 459, 468-70 (D.D.C. 1985); *Moore v. Floro*, 614 F. Supp. at 331-34; *Johnson v. Arnos*, 624 F. Supp. 1067, 1073-75 (N.D. Ill. 1985) (all granting prospective application only of reduction in limitations period); and *Breen v. City of Scottsdale*, 39 F.E.P. Cases 778, 780-81 (D. Ariz. 1985); (granting prospective application where retroactive application would have lengthened limitations period), *with Smith v. City of Pittsburgh*, 764 F.2d 188, 194-97 (3d Cir.), *cert. denied*, 106 S. Ct. 349 (1985); *Fitzgerald v. Larson*, 769 F.2d 160, 162-64 (3d Cir. 1985); *Gates v. Spinks*, 771 F.2d 916 (5th Cir. 1985), *cert. denied*, 54 U.S.L.W. 3598 (1986); *Mulligan v. Hazard*, 777 F.2d 340, 343-44 (6th Cir. 1985); *Carroll v. Wilkerson*, 782 F.2d 44 (6th Cir. 1986); *Wycoff v. Menke*, 773 F.2d 983 (8th Cir . 1985); *Fowler v. City of Louisville*, 625 F. Supp. 181 (W.D. Ky. 1985) (all retroactively reducing limitations period); and *Farmer v. Cook*, 782 F.2d 780 (8th Cir. 1986); *Jones v. Preuit & Mauldin*, 763 F.2d 1250 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 893 (19868); and *Rivera v. Green*, 775 F.2d 1381 (9th Cir. 1985) (all retroactively lengthening limitations period).

The need for guidance by this Court on the issue of retroactive application of the limitations selection method newly announced in *Wilson v. Garcia*, is firmly evidenced by the inconsistent results in the lower federal courts on this important issue. The present case plainly demonstrates the harsh and profoundly unfair result which can occur from inappropriate retroactive application.

IV. Conclusion.

For the reasons set forth above, a writ of Certiorari should be issued to the United States Court of Appeals for the Third Circuit to review the Judgment and Opinion entered by that Court.

Respectfully submitted,

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